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No. ——

In The

Supreme Court of the United States

October Term, 1995

JOSEPH T. STILLO and ADAM STILLO SR.,

Petitioners,

v.

UNITED STATES,

Respondent.

Petition For Writ Of Certiorari
To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Should a severance pursuant to Rule 8(b) of the Federal Rules of Criminal Procedure have been granted where the defendant, charged with a single count of conspiracy to commit extortion under color of official right, was joined in an indictment containing a RICO count not naming him as a defendant and alleging a host of bribery acts of which he had no knowledge or connection; and RICO count enabled the government to admit vast evidence of corruption unconnected to the defendant and, in some instances, dovetailing with the proof on the conspiracy count; and where the posture of the jury instructions did not adequately allow separate consideration?

II. Did the so-called depletion of assets theory used to prove a nexus between alleged extortionate conduct and interstate commerce satisfy the "substantially affect" test of *United States v. Lopez*, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), and did the facts presented establish federal jurisdiction where the government's interstate commerce witness lacked personal knowledge about the alleged victim's contributions, if any, to a law firm bank account used to purchase goods, and where the evidence also failed to show that the alleged victim customarily purchased goods in interstate commerce or did anything that would otherwise "obstruct, delay or affect" interstate commerce?

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PRAYER

Petitioners Joseph T. Stillo and Adam Stillo, Sr. respectfully pray that a writ of *certiorari* issue to review the judgment and order of the Seventh Circuit.

OPINION BELOW

The Seventh Circuit's opinion affirming Petitioners Joseph T. Stillo's and Adam Stillo's criminal convictions is published at 57 F.3d 553, and is attached hereto in Appendix A.

JURISDICTION

On June 9, 1995, a panel of the Seventh Circuit affirmed Petitioners Joseph T. Stillo's and Adam Stillo's convictions for conspiracy to commit extortion under color of official right, 18 U.S.C. § 1951. Petitioner Adam Stillo alone also was convicted of RICO, 18 U.S.C. § 1962(c). On July 5, 1995, a panel of the Seventh Circuit issued an order denying Petitioners Joseph T. Stillo's and Adam Stillo's timely filed petition for rehearing. Appendix B. (On July 7, 1995, the court issued a corrected order denying the petition for rehearing. Appendix B.) This petition is filed within 90 days of the order denying the petition for rehearing and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

2. Title 18, U.S.C., section 1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to

> do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

3. The Commerce Clause provides: "The Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8 cl. 3.

STATEMENT OF THE CASE

People v. Hess: On August 4, 1986, Robert Cooley, a criminal defense attorney acting as a government informant, went to a courthouse and met Judge Adam Stillo, Sr. Tr. 903. Cooley sought to ascertain whether Judge Stillo would fix a case. Tr. 903. During the conversation, Cooley asked Judge Stillo whether he could bring a case before him. Tr. 918. Cooley reminisced that he had not been able to "see" (pay) Judge Stillo in a long time. Tr. 921-22. Judge Stillo responded, "You don't have

to see me." Tr. 922. Cooley told Judge Stillo that he did not want any "special favors" unless he came in ahead of time. Tr. 924, 1515-17, 1531. Cooley added that if he did not see Judge Stillo before the case, it was just a "regular case." Tr. 925.

On August 20, 1986, the FBI filed a staged case, *People v. Hess*, which ultimately was assigned to Judge Stillo. Tr. 926, 1236-37. The "facts" in *Hess* were as follows: An Illinois State Trooper stopped Hess on an expressway for speeding and failing to signal a lane change. Tr. 930. When the officer looked into the auto, he saw some open beer cans. Tr. 930. The officer ordered Hess out of the car and searched it, finding marijuana in the glove compartment. Tr. 930.

On October 6, 1986, Cooley visited Judge Stillo in chambers. Tr. 942. Cooley cornered Judge Stillo and said, "I got something coming up in two weeks." Tr. 944, 963. Cooley advised that he would see Judge Stillo a couple days before. Tr. 964. Judge Stillo inquired whether Cooley would file a motion, and asked Cooley to bring in a memorandum of law. As Cooley walked away, Judge Stillo said, "See my nephew – do you know my nephew, Joey; see my nephew Joey." Tr. 967.

On October 10, 1986, Cooley went to Joseph ("Joe") Stillo's law office. Tr. 978. Cooley described Joe Stillo as being very busy and having a good law practice. Tr. 1534. While Cooley had seen Joe around before, Cooley and Joe Stillo were not friends, and did not have any prior dealings with each other. Tr. 979, 997, 1536.

In response to Cooley's question, Joe Stillo affirmed that he had talked to his uncle. Tr. 1540. Cooley and Joe then went to lunch at a restaurant in Joe Stillo's office building. Tr. 978-79. A variety of topics occupied the

conversation. Tr. 1540. Cooley eventually raised the subject of *Hess*. Tr. 1541. Cooley said that the judge wanted him to file a memorandum of law, and questioned whether that would look strange on a "little nonsensical marijuana thing." Tr. 1000. The conversation drifted to other topics, but Joe later brought up *Hess*. Tr. 1009-10. Cooley and Joe discussed the facts and the merit of a motion to suppress; Joe explained that a sophisticated prosecutor would say that the officer searched Hess' vehicle for his own protection in making the arrest. Tr. 1010-12, 1541, 1543-46. Joe seemed curious why Cooley wouldn't just accept supervision (a non-conviction under Illinois law), and suggested that rather than going through "all that" Cooley should just get his client six months supervision. Tr. 1012, 1546. Cooley responded that he couldn't do that because the client was going to be a stockbroker and supervision could affect his client's licensing. Tr. 1012-13, 1546.

Cooley attempted to give Joe his client's name. Tr. 1015. Joe said that was not necessary since Cooley did not have many cases "up there." Tr. 1015. Cooley then stated, "And, ah, you tell me what's fair and we'll take care of it then." Tr. 1015, 1547. At trial, Cooley interpreted his statement to mean: tell me how much the two of you want and I'll pay. Tr. 1015. Cooley further interpreted the statement to connote: if certain things take place I will pay. Tr. 1552.

Joseph Stillo's ensuing response was difficult to hear. *See* Tr. 856 (AUSA notes that one of the important portions of the tape "is something that is clearly less clear"). The government's transcript suggested that Joe Stillo responded, "alright." Tr. 1015. The defense version indicated that Joe said, "Oh." Tr. 1015, 2014.

In any event, after this colloquy, Cooley stated that he never complained "about the numbers" and that he was going to charge his client a "good dollar." Tr. 1017. Joe Stillo did not verbally respond to this statement. Tr. 1641. In fact, at no time during the October 10, 1986 conversation did Joe Stillo or Cooley set a specific dollar amount to control the result in *Hess*. Tr. 1019.

Joe Stillo and Cooley eventually left the restaurant. The conversation at the end of the tape-recording contains another difficult-to-hear passage. Tr. 2026. The government's transcript suggested that Joe Stillo said, "I will make the call. Don't worry about it." Tr. 1025. The defense version indicated that an individual named Paul walked up, and Joe said, "Ok Paul. Don't worry about it." Tr. 1025, 2017. On the specifics of this passage occurring seven years before trial, Cooley gave questionable and inconsistent testimony. In addition, Joseph Stillo called a Paul DeLucia as a witness at trial. DeLucia often ate lunch at the restaurant in Stillo's office building, and frequently saw Joe Stillo there. Tr. 2058. DeLucia listened to the passage of the tape-recording in question, and heard the words "Ok Paul" – not "I'll make the call." Tr. 2059.

On two occasions, Cooley called Joseph Stillo the day before the scheduled trial in *Hess*. Neither time did Joseph Stillo inform Cooley that his uncle would be unable to hear the case the next day. On both occasions, however, Judge Stillo was otherwise engaged and unable to hear the case. Before the third trial setting, Cooley did not even bother calling Joseph Stillo. Tr. 1583.

On November 5, 1986, Judge Stillo presided over the motion to suppress hearing in *Hess*. Tr. 1049-50. The government played a tape-recording of the *Hess* motion hearing and trial. At the motion hearing, Cooley's "client" testified. Tr. 1051, 1054. The State called the state trooper. Tr. 1057. Hess and the state trooper gave different versions of the same alleged event. Tr. 1244-45. Cooley failed to impeach the state trooper with police reports. Tr. 1245. Judge Stillo denied Hess' motion to suppress. Tr. 1066-67.

Hess elected a bench trial. Tr. 1067. At the trial, Hess testified that the marijuana found in his car was not his; that he had lent the car to a nephew; and that the nephew, when confronted, denied possessing the marijuana. Tr. 1069, 1270-71. After Hess' bench trial testimony, Judge Stillo commented that Hess did not present a witness who admitted possessing the marijuana. Tr. 1069-70. Judge Stillo found Hess guilty of possession of marijuana, improper lane usage and illegal transportation of alcohol. Tr. 1071. Thereafter, absent objection from the State, Judge Stillo sentenced Hess to six months supervision. Tr. 1076, 1278, 1283-84.

Later that day, Cooley went to Joe Stillo's office. Tr. 1085. Cooley told Joe that he thought the state trooper "tried to bang me. I think he manufactured a story." Tr. 1086. Cooley voiced empathy with the judge's ruling. Tr. 1086. Joe interjected, "That's not why he did it," and explained that the judge thought Cooley's client looked like an FBI agent. Tr. 1086-87. Cooley and Stillo discussed what FBI agents look like, with Joe noting that an "agent looks different to everyone depending on their level of paranoia at any given moment." Tr. 1087-88. Cooley insisted that his client was not an FBI agent, but really a mafia bookmaker. Tr. 1088.

During the conversation, Cooley mentioned that he charged his client one fee for going to court and an additional fee if successful. Tr. 1585-86. Joe admonished Cooley that such a fee arrangement was akin to a contingent fee in a criminal case and that Cooley did not "want that problem." Tr. 1586.

On November 7, 1986, Cooley returned to the courthouse and spoke to Judge Stillo. Tr. 1099. Judge Stillo told Cooley that his client sounded like a "plant." Tr. 1100, 1608. Cooley professed that he did not tell his client anything. Tr. 1100. Judge Stillo advised Cooley, "[Y]ou don't have to see me. I just give you a fair trial all the time. You know that." Tr. 1101. Cooley also apprised Judge Stillo that his client was a bookmaker. Tr. 1102-03. Judge Stillo questioned this since Cooley's client was not Italian. Tr. 1103. Cooley responded that his client was "with Ceaser's group, with the Jews up north." Tr. 1103.

On December 16, 1986, Cooley saw Joe Stillo in the Maywood courthouse. Tr. 114. At that time, Cooley expressed satisfaction with the disposition in *Hess*. Tr. 1115. Joe proposed that Cooley request a sentence reduction at the end of the six months. Tr. 1116. Joe did not ask Cooley for any money during this conversation, and Cooley offered none.

Cooley never made a motion to reduce or vacate in *Hess* because he "was busy with other things." Tr. 1113-14. On April 28, 1987, Cooley called Joe Stillo. Joe raised the possibility of a motion to vacate the guilty plea. Tr. 1591. However, there had not even been a guilty plea in *Hess*. Tr. 1591.

At no time during the alleged conspiracy did any person set a specific dollar amount to control the result in

Hess. Tr. 1516, 1588. At no time during the alleged conspiracy did Cooley pay anybody in reference to *Hess*. Tr. 1516. At no time did Joseph Stillo or Adam Stillo ask Cooley for money.

Joseph Stillo Is Joined In An Indictment Containing A RICO Count Alleging Adam Stillo's Commission Of Numerous Bribery Acts Having No Connection To Joseph Stillo: Close to five years from the day Joseph Stillo had lunch with Robert Cooley, the government sought and obtained a grand jury indictment against Adam Stillo and Joseph Stillo. Count Two, relating to *People v. Hess*, charged Adam Stillo and Joseph Stillo with conspiracy to commit extortion under color of official right. R. 1. Count One only named Adam Stillo as a defendant and charged a substantive RICO violation, 18 U.S.C. § 1962(c). R. 1. The RICO count alleged four separate racketeering activities. Racketeering Activity Number 4 related to *People v. Hess*. R. 1. The first three predicate acts did not at all involve or implicate Joseph Stillo. R. 1.

Racketeering Activity Number 1: This predicate act alleged that between 1976 and 1983, Judge Adam Stillo committed bribery and official misconduct by accepting and agreeing to accept cash bribes from Robert J. Cooley. R. 1.

Cooley testified that he met Judge Adam Stillo in 1976, and asked him who he (Cooley) should see (pay) afterwards. Tr. 760-62. Judge Stillo purportedly said that Cooley could see him directly. Tr. 763-64.

A few months later, Cooley had a misdemeanor case in front of Judge Stillo. Tr. 765. Before Judge Stillo heard the case, Cooley, who desired a not guilty finding, spoke to the judge. Tr. 768. After Cooley won the case, he visited Judge Stillo in chambers. Tr. 768-69. Cooley asked Judge

Stillo if a hundred would be enough. Tr. 769. The judge said, "whatever you think." Tr. 769. Cooley gave Judge Stillo a hundred dollar bill. Tr. 769.

Between 1976 and 1983, Cooley had five or six other unnamed cases before Judge Stillo. Tr. 771, 779. On three occasions between 1976 and 1980, Cooley paid Judge Stillo in chambers after the case was over. Tr. 772-73. Cooley paid Judge Stillo the "standard rate" of between $100 and $200 on misdemeanor cases. Tr. 773, 1559. Cooley also claimed that he had a couple felonies before Judge Stillo between 1980 and 1983. Tr. 773-75. Cooley paid Judge Stillo $1000 and $2000 on these cases. Tr. 773-74, 776. Cooley stopped paying Judge Stillo in 1983 because of Greylord, an extensive government investigation of the Cook County court system. Tr. 778, 781. On all of the cases in which Cooley said he paid Judge Stillo, he did not use a bagman. Tr. 969-70.

Racketeering Activity Number 2: This predicate act alleged that around late 1981 Judge Adam Stillo committed bribery and official misconduct by accepting and agreeing to accept a cash bribe from attorney William Swano, a corrupt lawyer who pled guilty to conspiring to bribe the judge presiding over a double murder case against three street gang executioners. Tr. 312-13. R. 1.

Swano testified he paid Judge Adam Stillo once. Tr. 348. Sometime in 1981 an attorney contacted Swano about an LSD delivery case pending before Judge Stillo, *People v. Blackman*. Tr. 354-55, 365-66. The attorney related that the defendant's father had a lot of money, and that the defendant had a bad criminal record and did not want to go to back to jail. Tr. 355, 365.

Swano took Judge Stillo to lunch and discussed the case. Tr. 367. Swano explained that he wanted to avoid

the defendant going to jail. Tr. 367. Judge Stillo replied that he could help. Tr. 369. After Swano informed Judge Stillo that he would pay $3000, Judge Stillo responded "whatever, Billy." Tr. 369.

Thereafter, Swano appeared before Judge Stillo and engaged in a guilty plea conference in which Judge Stillo decided to give the defendant 18 months periodic imprisonment. Tr. 372-81.

Some time after the sentencing hearing, Swano met Judge Stillo in a restaurant. Tr. 392. Attorney Nick Spina, one of Judge Stillo's relatives, also was present. Tr. 394. When Judge Stillo left the table to use the washroom, Swano followed and gave Judge Stillo an envelope containing $2000. Tr. 394-95.

Racketeering Activity Number 3: This predicate act alleged that around September 1981, Adam Stillo committed bribery and official misconduct by receiving and agreeing to accept a cash bribe from attorney James Costello to influence the performance of an act relating to the employment and function of an assistant state's attorney. R. 1.

James Costello also had a long career of corruption as a police officer, a state prosecutor and a criminal defense attorney. As Costello related his vast corruption during direct examination, Joseph Stillo objected. Tr. 1736. Counsel argued the government was painting the whole system as corrupt, and because Joseph Stillo was a cog in the system, the jury would necessarily infer guilt. Tr. 1736-37. The district court, however, refused to instruct the jury that it should consider Costello's testimony about his past corruption only as to credibility. Tr. 1738. Absent a limiting instruction, Costello went on to testify about rampant corruption in the court system. Tr. 1738-39.

In 1981, David Belser retained Costello to represent him on two driving on suspended license cases. Tr. 1755-56. On August 10, 1981, Costello met with Judge Stillo's son, Adam Stillo, Jr., the prosecutor in one of the cases. Tr. 1770. Costello desired to ensure a disposition whereby Belser could continue driving. Tr. 1764. Adam Stillo, Jr., however, refused to accede. Tr. 1770.

Subsequently, Costello visited Judge Stillo. Tr. 1777. Costello informed Judge Stillo that Stillo's son had refused to agree to supervision. Tr. 1777. Judge Stillo told Costello that he would speak to his son. Tr. 1778. Costello offered Judge Stillo $100. Tr. 1778. Judge Stillo responded, "You don't have to do that." Tr. 1778. Nonetheless, Costello insisted that Judge Stillo take the money. Tr. 1778. The judge said he would give the money to his son. Tr. 1778.

When Costello next appeared in *Belser*, he spoke to Adam Stillo, Jr., who related that he would not be handling the case, that Costello should ask for a pretrial conference and that everything was "all set." Tr. 1778-82. At the pretrial conference, Costello requested supervision. Tr. 1783. The prosecutor did not object. Tr. 1783-85. The judge agreed to impose a one year supervision sentence and did so. Tr. 1785.

Joseph Stillo's Requests For Severance: Given that he was not named as a defendant in the RICO count or alleged to have participated in any of the first three racketeering activities, and fearing the prejudicial effects of misjoinder and spillover, Joseph Stillo, citing Rules 8(b) and 14 of the Federal Rules of Criminal Procedure, filed a pretrial motion for severance. R. 27, 28. The district court denied the motion. R. 36, 37.

During its opening statement, the government painted a picture of vast court corruption and detailed Adam Stillo's participation in numerous bribery incidents with government witnesses Cooley, Swano and Costello. This prompted Joseph Stillo to renew his severance motion. Tr. 84-85. Joseph Stillo's attorney observed that the jury would have to find that "Adam did it" to convict Joseph Stillo on Count Two, and predicted that the jury could not separate the propensities supporting the RICO count against Adam Stillo and not use such evidence in deciding Count Two. Tr. 84-85. The district court denied the motion. Tr. 85.

Jury Deliberations: The same jury deliberated upon the fates of Adam Stillo and Joseph Stillo. During the afternoon of the first day of jury deliberations, the jury sent out a note, asking: "If not found guilty in Count Two, does that wipe out Count One." Tr. 2606. This question concerned the impact of the statute of limitations in Adam Stillo's case. *People v. Hess* was the only predicate act within five years of the indictment. Thus, because at least two separate acts are necessary for a RICO conviction, the jury had to find Adam Stillo committed the racketeering activity involving *People v. Hess* to convict on Count One. In response to the question, the district court directed the jury's attention to the racketeering elements instruction relating to *People v. Hess* and the statute of limitations instruction. Tr. 2608-12.

At 4:15 p.m. on the second day of deliberations, the jury returned its verdict. The jury found Adam and Joseph Stillo guilty of Count Two. Tr. 2628-29. The jury further found Adam Stillo guilty of Count One, and denoted that Adam committed racketeering activities 1

(bribes from Robert Cooley between 1976 and 1983) and 4(1), 4(2) and 4(4) (*People v. Hess*).

REASONS FOR GRANTING THE PETITION[1]

I. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT MISAPPLIED THE PLAIN LANGUAGE OF RULE 8(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND ITS DECISION UPHOLDING JOINDER CONFLICTS WITH DECISIONS UPON SIMILAR FACTS FROM OTHER COURTS OF APPEAL.

A. Rule 8(b) Analysis

Joseph Stillo sought severance under Rule 8(b) of the Federal Rules of Criminal Procedure. Rule 8(b)'s joinder test is designed to prevent the prejudice that occurs when several defendants are charged with similar yet unrelated offenses. *E.g., United States v. Weaver*, 905 F.2d 1466, 1477 (11th Cir. 1990). Whether joinder is proper under Rule 8(b) is determined by examining the four corners of the indictment. *E.g., United States v. Schaffer*, 362 U.S. 511 (1960). If a defendant has been misjoined under Rule 8(b), the district court has no discretion and must order severance. *E.g., United States v. Nettles*, 570 F.2d 547, 551 (5th Cir. 1978); *United States v. Pacente*, 490 F.2d 661, 665 (7th Cir. 1973). Whether a district court erred in failing to grant a severance under Rule 8(b) is a question of law reviewed *de novo*. *E.g., United States v. Price*, 13 F.3d 711, 717 (3rd Cir. 1994); *Nettles*, 570 F.2d at 551.

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[1] In the interests of judicial economy, bravity and to avoid repetition, Adam Stillo, Sr. joins in this petition only as to the second issue presented.

Under Rule 8(b), two defendants "may be charged in the same indictment . . . if they are alleged to have participated in . . . same series of acts or transactions constituting an offense." Fed. R. Crim. P. 8(b). The phrase "same series of acts or transactions" means "acts or transactions that are pursuant to a common plan or common scheme . . . which is to say (in the usual case) that the acts or transactions are parts of a single conspiracy." *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985). *See also United States v. Nicely*, 922 F.2d 850, 853 (D.C. Cir. 1991). A single overall conspiracy charge naming all defendants satisfies Rule 8(b). *Schaffer*, 362 U.S. 511. While the indictment need not include an all-encompassing conspiracy count for joinder to comply with Rule 8(b), in the absence of such a count, other facts must suggest the existence of an overall scheme encompassing all the defendants and charged offenses. *Velasquez*, 772 F.2d at 1353; *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982). All defendants must have known and participated in the comprehensive scheme. *Id.* at 656. *See also United States v. Castro*, 829 F.2d 1038, 1045 (11th Cir. 1987), *withdrawn in part on other grounds*, 837 F.2d 441 (1988) (reversing Castro's conviction due to misjoinder because the government failed to adduce evidence that defendant Castro knew of the existence of other spokes of a conspiracy); *United States v. Ellis*, 709 F.2d 688, 689-90 (11th Cir. 1983) (same).

The necessary connection required to join offenses and defendants under Rule 8(b) is *not* established by one of the defendants having committed all offenses charged in an indictment. "[T]he mere fact that two conspiracies have overlapping memberships will not authorize a single indictment if the conspiracies cannot be tied together

into one conspiracy, one common plan or scheme." *Velasquez*, 772 F.2d at 1353. *See also Nicely*, 922 F.2d at 854; *United States v. Hatcher*, 680 F.2d 438, 441 (6th Cir. 1982); *Nettles*, 570 F.2d at 551. To put it another way, joinder cannot depend upon the collapsing of Rules 8(b) and 8(a) (which permits joinder of two or more offenses in an indictment against a single defendant if the offenses are of the same or similar character or connected together by the same common scheme). *E.g., Velasquez*, 772 F.2d at 1352; *United States v. Bibby*, 752 F.2d 1116, 1121 (6th Cir. 1984); *United States v. Diaz-Munoz*, 632 F.2d 1330, 1335-36 (5th Cir. 1980).

Here, the Rule 8(b) violation as to Joseph Stillo is manifest. First, the indictment did not charge a single all-encompassing conspiracy count against both defendants. The overarching count in the indictment, the RICO count, did not name Joseph Stillo as a defendant. Moreover, the indictment failed to establish that Joseph Stillo participated in, or even knew about, the overall scheme delineated in the RICO count. Indeed, Joseph Stillo was not in any way connected to seven of the eight bribery-tainted court cases described in Count One.

The Seventh Circuit panel, however, found joinder not in violation of Rule 8(b) on grounds that the "other predicate RICO acts in which Joseph Stillo was not involved were earlier attempts by Judge Stillo to collect bribes from criminal defense lawyers and thus part of the same 'series of acts or transactions' as the later *Hess* scheme." *United States v. Stillo*, 57 F.3d 553, 557 (1995). This ruling, however, does violence to the plain language of Rule 8(b). Rule 8(b) permits joinder of two defendants in a single indictment if they participated in the "same series of acts or transactions constituting an offense or

offenses." Fed. R. Crim. P. 8(b). The "series of transactions . . . constituting" the RICO offense were racketeering activities 1, 2, 3 and 4. Joseph Stillo only was alleged to have participated in one discrete component of the series, *People v. Hess*. However, the allegations concerning Joseph Stillo's involvement in *Hess* could not amount to the "same series of acts or transactions constituting [the RICO] offense." Fed. R. Crim. P. 8(b). This is because more than one racketeering act is necessary to satisfy RICO's pattern of racketeering activity requirement. 18 U.S.C. § 1961(5). As allegations of Joseph Stillo's involvement in *Hess*, standing alone, could not amount to the "same series of acts or transactions constituting [the RICO] offense," Fed. R. Crim. P. 8(b), Joseph Stillo should not have been joined in an indictment containing the RICO offense, and the Seventh Circuit panel's finding to the contrary constitutes a misreading of the plain language of Rule 8(b).

In addition, *certiorari* is appropriate because the Seventh Circuit's opinion upholding the joinder conflicts with a series of court of appeals cases in which misjoinder has been found on facts legally akin to those in this case. *See Nicely*, 922 F.2d at 854-55; *Castro*, 829 F.2d at 1045; *United States v. McClain*, 823 F.2d 1457, 1467 (11th Cir. 1987); *Velasquez*, 772 F.2d at 1355; *Ellis*, 709 F.2d 688; *Hatcher*, 680 F.2d at 441-42; *United States v. Chinchic*, 655 F.2d 547 (4th Cir. 1981); *Nettles*, 570 F.2d 547.

B. The Petitioner Suffered Prejudice As A Result Of The Misjoinder.

In *United States v. Lane*, 474 U.S. 438 (1986), this Court held that actual prejudice must be shown to reverse for Rule 8(b) misjoinder. A harmless error analysis "must be

applied with great caution in instances of misjoinder under Rule 8(b)," *United States v. Hatcher*, 680 F.2d 438, 442 (6th Cir. 1982), and any serious doubts about whether a defendant has been prejudiced by misjoinder "must be resolved in favor of the defendant." *United States v. Nicely*, 922 F.2d 850, 855 (D.C. Cir. 1991).

In *Lane*, this Court found the Rule 8(b) misjoinder harmless error, in part, because of the overwhelming evidence of guilt. 474 U.S. at 449-50. In this case, however, the misjoinder cannot be so dismissed. Proof of Joseph Stillo's guilt was not overwhelming. For Joseph Stillo to have been guilty of Count Two, the government had to prove beyond a reasonable doubt that Adam Stillo and Joseph Stillo agreed among themselves to extort money under color of official right from Robert Cooley, and that the alleged extortionate conduct could have affected interstate commerce. 18 U.S.C. § 1951. The strength of the government's proof on the interstate commerce element was questionable at best. *See infra* § II. Moreover, with regard to the agreement element, the government failed to advance any direct proof of Joseph Stillo and Adam Stillo actually agreeing among themselves to accept money from Robert Cooley. Neither Joseph Stillo nor Adam Stillo ever requested any money in conjunction with *Hess*, and Cooley did not pay any. Thus, the jury's conclusion that Adam Stillo agreed with Joseph Stillo to accept money had to be attained by guess or inference. The question becomes whether the jury's finding as to Joseph Stillo on Count Two was influenced by evidence spilling over from the government's proof against Adam Stillo on Count One. It was.

Joinder of the RICO count enabled the government to place before the jury voluminous, prejudicial evidence,

having absolutely nothing to do with Joseph Stillo. The jury heard about pervasive, longstanding and vast corruption from Robert Cooley, William Swano and James Costello. In determining whether Joseph Stillo and Adam Stillo agreed to accept money for *Hess*, how could the jury not be swayed by the testimony of hundreds, if not thousands, of court cases being tainted by bribery? This highly prejudicial evidence (save perhaps Robert Cooley's background), however, could not have been presented if severance had been ordered.

Substantial risk of transference of guilt inured to Joseph Stillo as a result of the jury hearing detailed evidence of the pre-*Hess* bribery relationships between Adam Stillo and government witnesses Swano, Costello and Cooley. Notably, this testimony from Cooley, Swano and Costello, inadmissible against Joseph Stillo, dovetailed with the facts of *Hess*, i.e., alleged passive bribery by Adam Stillo with a family member. In considering guilt on Count Two how could the jury not be influenced by Swano's testimony about the presence of a family member at the alleged crime scene, and Adam Stillo's alleged passive acceptance of money after a case? Similarly, how could the jury disregard Costello's testimony that Adam Stillo agreed to involve a family member in a bribery scheme? Moreover, spillover clearly resulted from Robert Cooley's testimony that he bribed Adam Stillo on five occasions before *Hess*. In reaching the inference that Joseph Stillo and Adam Stillo agreed among themselves to accept money, how could the jury wholly displace, ignore and forget Robert Cooley's testimony that he had bribed Adam Stillo on five prior occasions prior to *Hess*? The short answer to all this is that, under the unique circumstances of this case, a jury of twelve lay persons

realistically could not have ignored all this evidence in determining Joseph Stillo's fate. Indeed, even the Seventh Circuit could not resist the temptation of using Adam Stillo, Sr.'s prior bribery relationships as evidence of Joseph Stillo's guilt. In finding the evidence against Joseph Stillo sufficient, the Seventh Circuit expressly relied upon Adam Stillo, Sr.'s prior bribery relationship with Robert Cooley. *Stillo*, 57 F.3d at 559.

This Court's decision in *Zafiro v. United States*, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993), is instructive. In *Zafiro*, this Court observed that severance is warranted (under Rule 14) if joinder seriously risks compromise of a specific trial right:

> Such a risk might occur when evidence that the jury should not consider against a defendant and would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty.

113 S. Ct. at 938.[2]

These words might as well have been written for this case. The evidence of Adam Stillo's prior wrongdoing – evidence that would have been inadmissible had Joseph Stillo stood trial alone – erroneously contributed to the jury's guilty verdict against Joseph Stillo. Plainly, the "scanty evidence" of guilt on Count Two plainly "got a

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[2] Joseph Stillo also moved for severance under Rule 14 of the Federal Rules of Criminal Procedure. Severance under Rule 14 is warranted if the defendant is prejudiced by joinder. *See Lane*, 474 U.S. at 447; *Schaffer*, 362 U.S. at 515-16.

psychological boost" from the evidence of general corruption and Adam Stillo's prior acceptance of specific bribes. *See Velasquez*, 772 F.2d at 1355. The Seventh Circuit panel, however, failed to address this prejudice, or the *Zafiro* analysis. Because Joseph Stillo suffered actual prejudice from the proof on Count One bolstering Count Two, the Seventh Circuit erred in refusing to reverse for a new trial. *See United States v. Davidson*, 936 F.2d 856, 861 (6th Cir. 1991); *Nicely*, 922 F.2d at 855-56; *Castro*, 829 F.2d at 1045-46; *McClain*, 823 F.2d at 1467; *Velasquez*, 772 F.2d at 1355.

Further, upon close examination of the jury instructions, one finds dissonance ringing about the concept of separate consideration. Separate consideration obviously assumes that one defendant could be found guilty and the other defendant not guilty. This, however, was not legally possible with respect to Count Two. First, the concept of separate consideration collided with the essential elements of the conspiracy charged in Count Two. According to the evidence, Joseph Stillo and Adam Stillo were the only possible conspirators. Of course, there is no such thing as a one man conspiracy, *Iannelli v. United States*, 420 U.S. 770, 777 (1975), *Morrison v. California*, 291 U.S. 82, 92 (1934), and the jury instructions stated as much. To find Adam Stillo guilty of Count Two, the jury also had to convict Joseph Stillo. In spite of the separate consideration charge, the jury could not have found Joseph Stillo not guilty of Count Two, and Adam Stillo guilty, absent breaching the two man conspiracy requirement. Second, Joseph Stillo was a private attorney, incapable of committing extortion under color of official right alone. *United States v. McClain*, 934 F.2d 822, 830 (7th Cir. 1991). Thus, absent not following the instructions, the

jury could not have found Adam Stillo not guilty and Joseph Stillo guilty. These conditions hardly evince separate consideration.

There is more. Conduct surrounding *People v. Hess* formed the only offenses allegedly committed by Adam Stillo within five years of the indictment. Accordingly, the district court instructed: "To find Adam Stillo, Sr. guilty of racketeering as charged in Count One, the Government must prove that the defendant committed racketeering act four as part of the racketeering activity." Tr. 2608-12. Racketeering act four, in turn, contained the conspiracy charge set forth in Count Two. R. 1. While the statute of limitations instruction did not technically apply to Joseph Stillo, the instruction had grave implications for him. To find Adam Stillo guilty of Count One, the jury had to find Adam Stillo committed wrongdoing in reference to *Hess*. The jury could only find the commission of the *Hess*-related conspiracy (charged in racketeering activity number 4 and Count Two) by finding *both* defendants guilty. This hardly bespeaks separate consideration.

Moreover, the jury perceived the interdependency between Counts One and Two. Early during its two days of deliberations, the jury asked, "If we find not guilty on Count Two does this wipe out Count One?" Tr. 2606. By directing the jury's attention to the statute of limitations and the *Hess* racketeering activity elements instructions, the judge's response indicated that the jury could only convict Adam Stillo of Count One if it found him guilty of wrongdoing in connection with *Hess*. Tr. 2609-12. If the jury did not so find, it would have had to let Adam Stillo completely free due to the technicality of the statute of limitations – a legal defense that hardly incites an impassioned yearning to acquit in the common juror. Asking a

jury to acquit a former judge of a RICO violation, spanning over ten years and involving four separate predicate acts and eight bribes, asked a lot, especially in light of the nature of the government's proof on the acts outside the statute of limitations. But whatever the merits of the cause for Adam Stillo's conviction or acquittal, Joseph Stillo simply should not have been served up as a preconditional sacrificial lamb for Adam Stillo's conviction.

II. IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED STATES V. LOPEZ*, 115 S. CT. 1624, 131 L. ED. 2D 626 (1995), AND THE FACTS PRESENTED, THE GOVERNMENT FAILED TO ESTABLISH FEDERAL JURISDICTION.

A. Interstate Commerce Theory And Evidence

Title 18, U.S.C., section 1951 makes it a federal crime for persons to conspire to "obstruct, delay or affect commerce" by extortion under color of official right. To establish federal jurisdiction under the Hobbs Act, the government must prove a nexus between the alleged extortionate conduct and interstate commerce. *E.g.*, *United States v. Elders*, 569 F.2d 1020, 1023-24 (7th Cir. 1978).

In this case, the government, in an effort to establish federal jurisdiction, relied upon a so-called "depletion of assets" theory. While this theory has never been embraced by a decision of this Court, it has found acceptance in some courts of appeal. "Under the depletion of assets theory, commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce,

has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods." *Elders*, 569 F.2d at 1023-24.

In an attempt to satisfy the depletion of assets theory, the government called Jennifer Demchuck. Until January 1990, Demchuck worked at: Lemke & Cooley; Robert J. Cooley & Associates; and Cooley, Hermanek & Associates. Tr. 1879. Demchuck did not know the corporate structure of any of these entities, and described herself as being a secretary for a number of lawyers in an office. Tr. 1891-92. Demchuck testified that she commenced working at the law office in the spring of 1986. Tr. 1893. At two previous trials, however, Demchuck testified that she started working there during the spring of 1987. Tr. 1893-94.

Demchuck paid for office supplies out of a law firm checking account. Tr. 1881. While Demchuck testified that Cooley made weekly contributions to the law firm checking account, she had "no idea" how much money Cooley allegedly contributed to the Lemke & Cooley bank account between August and November 1986, the time of the alleged conspiracy. Tr. 1882, 1898. Demchuck admitted that she did not have personal knowledge about the Lemke & Cooley bank account. Tr. 1895, 1898. At one point, Demchuck testified that there was no Lemke & Cooley bank account, and, at another, she testified that a Lemke & Cooley bank account was the one used in 1986, but she did not handle it. Tr. 1897-98.

As part of the interstate commerce evidence, the government offered a series of bills, two of which the Seventh Circuit discussed. R. 103. One such bill showed that Lemke & Cooley ordered an $11.75 Texas Instruments mini-desk calculator from Quill corporation. R. 103, Ex. 1;

Tr. 1883. On August 28, 1986, Quill shipped the calculator from Texas to Chicago. Tr. 1883. Demchuck testified that this calculator was ordered by a person named Donna, and Demchuck did not know who the calculator was for. Tr. 1895. Demchuck did not know, and the bill did not establish, the date on which payment was sent for the mini calculator Tr. 1895.

The other bill was for a $188.40 worth of will covers and will envelopes provided by Histacount, a New York corporation. R. 103, Ex. 2. The will materials were paid for on November 24, 1986. Tr. 1884; R. 103, Ex. 2. During his testimony, Cooley never claimed to be a probate lawyer, and Demchuck affirmed that lawyers other than Cooley did the civil work. Tr. 1896.

B. The So-Called Depletion Of Assets Theory As Applied In This Case Failed To Satisfy The "Substantially Affect" Test Of This Court's Decision in *United States v. Lopez*, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

The sufficiency of the government's proof on the interstate commerce element must be questioned in light of this Court's decision in *United States v. Lopez*, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). In holding the Gun-Free School Zones Act of 1990 invalid as being beyond Congress' Commerce Clause power, this Court reminded that the federal government's powers "are few and defined." *Lopez*, 131 L. Ed. 2d at 633. Under *Lopez*, the proper test to determine whether activity can be properly regulated by the federal government under the Commerce Clause is "whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 637.

With *Lopez* in mind, one cannot deduct that the government satisfied the interstate commerce essential element. Viewed as a whole, this case had nothing to do with "Commerce . . . among the several States." U.S. Const. Art. I, § 8 cl. 3. It cannot be said that the alleged conspiracy to commit extortion under color of official right would have "affected" interstate commerce if successful. Indeed, it is questionable whether the depletion of assets theory – which permits a finding of affection of interstate commerce where the connection between the alleged extortion and the commerce is attenuated – survives the *Lopez* test. In any event, application of the "depletion of assets" theory simply does not leave the conclusion that the alleged extortion conspiracy had the potential to affect or interfere with commerce among the States, let alone *substantially affect* interstate commerce as required by *Lopez*. At best, this case presents garden variety state court bribery allegations to be resolved in a state rather than a federal forum. *See United States v. Pappadopoulos*, No. 93-10577, Slip op. (9th Cir. August 25, 1995) (Proof that a residence received natural gas from out-of-state sources is not enough to demonstrate that the arson of a home had a substantial effect on interstate commerce as required by the jurisdictional element of the federal arson statute.).

This case presents yet another example of United States Courts of Appeals effectively legislating out of Section 1951, the affect on interstate commerce requirement. The interstate commerce provision is an essential element of this and other federal statutes, and should not be ignored or overlooked. Regardless of the amount, duration or substance, there still must be an "affect" on interstate commerce. By way of analogy, if one throws a

rock into a pond, the rippling of the water indicates an "affect" on the pond. However, if one throws a rock over the pond and it never lands in the water, there is no "affect" on the pond, real or imagined. In the instant case, the government failed to prove that any of the acts set forth in the indictment "affected" interstate commerce in any way, and thus, federal jurisdiction does not exist.

C. The Government Failed To Establish A Nexus Between The Alleged Conspiracy To Commit Extortion Under Color Of Official Right And Interstate Commerce.

Even accepting the government's evidence, the proof failed on the essential element of interstate commerce. Spurning the argument that the government failed to connect Cooley to the purchase of goods in interstate commerce, the Seventh Circuit panel declared:

> But the government presented numerous items purchased by the law firm in interstate commerce, including a calculator and will covers, and an office employee of Cooley's firm testified that such supplies were purchased from a common account to which the three members of the firm, including Cooley, made weekly contributions.

United States v. Stillo, 57 F.3d 553, 558 (1995).

Numerous errors are readily identifiable in this finding. First, the record shows that Jennifer Demchuck, the "office employee of Cooley's firm," actually testified that *she did not handle and had no personal knowledge of the bank account used to purchase supplies during the time frame of the alleged conspiracy*. Tr. 1882, 1895, 1898. Thus, there simply was no legitimate basis for the court to have concluded that "an office employee of Cooley's firm testified that such supplies were purchased from a common account to

which the three members of the firm, including Cooley, made weekly contributions."[3]

Furthermore, the government failed to prove the structure of Cooley's "firm." On this record, it cannot be said whether Cooley had a firm, corporation, partnership or sole proprietorship. In any event, that the "firm" may have purchased goods in interstate commerce was not relevant to the charges *alleged in the indictment* since neither the law firm nor lawyers other than Cooley were alleged to have been victims of the so-called extortion conspiracy. *Cf. Stirone v. United States*, 361 U.S. 212 (1960).

In sustaining the government's proof on the interstate commerce essential element, the Seventh Circuit observed that the law firm purchased a calculator and will covers. But the panel failed to acknowledge that the government did not prove that either of these items were

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[3] On appeal, Joseph Stillo and Adam Stillo, Sr. also challenged the adequacy of the interstate commerce jury instruction which did not require the government to prove that Cooley made monetary contributions to the bank account used to purchase supplies around the time of the alleged conspiracy. The Seventh Circuit panel found "that the given instruction does not explicitly require that the jury find that Cooley contributed money to the firm's expense fund. *The government's evidence on this point was, however, uncontradicted.*" *Stillo*, 57 F.3d at 560 (emphasis added). The court's assertion does absolute violence to the record. Jennifer Demchuck expressly admitted that she did not handle or have personal knowledge of the bank account used by the law office in 1986 (the time of the charged conspiracy), and had "no idea" how much money Cooley contributed to the account, if any, during the period of the alleged conspiracy. Tr. 1882, 1895, 1898. In addition, Demchuck testified at two previous trials that she did not even start working for Cooley until the spring of 1987. Tr. 1893-94. In light of this, the panel's statement that the evidence on the point was "uncontradicted" was simply wrong.

purchased by or for Cooley. Indeed, the receipt for the eleven dollar calculator indicated that it was ordered by a "Donna," and the government did not establish when (if ever) payment was sent for the mini calculator. Tr. 1895. Further, the will covers obviously were not for Cooley since he did not practice probate law. Tr. 1895-96. Based upon these facts, the government utterly failed to prove that the alleged extortion conspiracy had the potential to deplete the alleged victim's (Cooley's) assets that could have been used to purchase goods in interstate commerce.

All things considered, the government's proof on the interstate commerce element was deficient. The government simply failed to establish a connection between the alleged conspiracy to commit extortion under color of official right and interference with interstate commerce. Moreover, the proof in this case was far less than that recently upheld in *United States v. Robertson*, 115 S. Ct. 1732, 131 L. Ed. 2d 714 (1995), a RICO case involving an attack on the government's interstate commerce proof. To prevent garden variety state cases from becoming subject to federal jurisdiction, and to resolve perceived tension between *Lopez* and *Robertson, certiorari* should be granted.

CONCLUSION

WHEREFORE, Petitioners Joseph T. Stillo and Adam Stillo, Sr. respectfully pray that this Honorable Court grant this petition and issue a writ of *certiorari* to review the judgment of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Adam STILLO, Sr. and Joseph T. Stillo, Defendants-Appellants.

Nos. 94-2678, 94-2679.

United States Court of Appeals,
Seventh Circuit.

Argued April 5, 1995.

Decided June 9, 1995.

Rehearing Denied July 5, 1995.

After pretrial motions were ruled on, 1992 WL 297388, defendants were convicted in the United States District Court for the Northern District of Illinois, Harry D. Leinenweber, J., 1993 WL 565988 of conspiracy to commit extortion under color of official right and one defendant was convicted of racketeering. Defendants appealed. The Court of Appeals, Cummings, Circuit Judge, held that: (1) evidence sustained extortion charge, and (2) jury instructions on interstate commerce element of extortion threat were adequate.

Affirmed.

Scott T. Mendeloff, Asst. U.S. Atty., Office of the U.S. Atty., Crim. Div., Chicago, IL, Barry Rand Elden, Asst. U.S. Atty., Office of the U.S. Atty., Crim. Receiving, Appellate Div., Chicago, IL, Jonathan Drimmer (argued) Dept. of Justice, Washington, DC, for U.S.

Charles K. Piet (argued), Chicago, IL, Michael D. Ettinger, Ettinger & Pechter, Palos Hills, IL, for Adam Stillo, Sr.

Edward M. Genson, Marc W. Martin (argued), Genson, Steinback, Gillespie & Martin, Chicago, IL, for Joseph T. Stillo.

Before POSNER, Chief Judge, and CUMMINGS and MANION, Circuit Judges.

CUMMINGS, Circuit Judge.

On July 29, 1993, a jury found Judge Adam Stillo guilty of racketeering and, along with his nephew, lawyer Joseph Stillo, conspiracy to commit extortion under color of official right. Both counts were based on Judge Stillo's corruption of the Cook County, Illinois, Circuit Court. Defendants appeal their convictions. We affirm.

Background

Defense attorney Robert Cooley first met Judge Stillo at a party in 1976. Cooley asked the judge whom he should see to fix a criminal case assigned to Judge Stillo. Judge Stillo, knowing that Cooley was a frequent supplier of bribes to other judges and public officials, told Cooley that he would deal with him directly. Not long after the party, Judge Stillo accepted a bribe from Cooley to fix a misdemeanor case. Judge Stillo met with Cooley before trial and agreed to find Cooley's client not guilty. After the trial Cooley met with Judge Stillo in his chambers. Cooley asked the judge whether $100 was an appropriate payment. Judge Stillo responded: "Whatever you think" and accepted the $100 in cash.

Between 1977 and 1983, Cooley bribed Stillo in five or six cases. Cooley would meet with the judge before trial and after a favorable disposition, Cooley would visit the judge in his chambers and pay him $100-$200 for fixing a misdemeanor and $1000-$2000 for fixing a felony. After the federal investigation into corruption among Chicago public officials became known in 1983, Cooley ceased paying bribes to Judge Stillo.

On August 4, 1986, Cooley, now working with the FBI, inquired of Judge Stillo if he was still accepting bribes for favorable rulings. The judge said yes and that the system was the same as before. In order to catch Judge Stillo in the act, the FBI filed the fictitious case of *People v. Hess* on August 20, 1986. According to the fictional court papers, James Hess – played by an undercover FBI agent – had been stopped for speeding and an illegal lane change by an Illinois state trooper. Noticing open beer cans, the trooper had searched the car and discovered marijuana.

The *Hess* trial was set for October 21, 1986, before Judge Stillo. On October 6, Cooley visited the judge in his chambers and asked whether he would suppress the marijuana in exchange for a bribe to which Judge Stillo agreed. Judge Stillo told Cooley that to "make it look better" he should file a memorandum of law in support of his motion to suppress. Judge Stillo told Cooley not to worry and to speak to his nephew attorney Joseph Stillo. Thereafter, Cooley telephoned Joseph Stillo and arranged a meeting. On October 10, 1986, the two met. Joseph Stillo told Cooley that he had spoken to his uncle, Judge Stillo. Joseph Stillo and Cooley then went to lunch to arrange to fix the *Hess* case.

Over lunch, Cooley explained the "facts" of the *Hess* case to Joseph Stillo and that he wanted to have the marijuana suppressed. Joseph Stillo agreed. Cooley also told Joseph Stillo that he would pay any amount the Stillos deemed fair, to which Joseph Stillo also agreed. Cooley and Joseph Stillo arranged for Cooley to call Joseph Stillo the day before *Hess* was to go to trial and say "The party is tomorrow night. Are you gonna go?" to alert Joseph Stillo that *Hess* would be tried the following day and to confirm the fix. As they parted following lunch, Stillo reassured Cooley, saying, "I'll make the call . . . . Don't worry about it."

Cooley called Joseph Stillo the day before *Hess* was scheduled to go to trial to verify that the "benefit" was still on for the following day. Joseph Stillo answered affirmatively but the *Hess* trial was postponed.

Hess was finally tried to the court on November 5, 1986. A few days before, Cooley visited Judge Stillo to confirm that the bribe scheme was in place. Contrary to the agreement, however, Judge Stillo denied Cooley's motion to suppress the marijuana, found Hess guilty, and sentenced him to six months' supervision.

That afternoon Cooley visited Joseph Stillo's law office and was told that Judge Stillo had found Hess guilty because he looked like an undercover FBI agent. Joseph Stillo agreed to ask his uncle whether Cooley could seek a reduced sentence for Hess. On November 7, Cooley spoke directly with Judge Stillo who reiterated that he found Hess guilty because he looked like an FBI "plant."

On December 16, Cooley again spoke with Joseph Stillo, who told Cooley not to drop his attempt to seek favorable treatment for Hess because at the end of six months Judge Stillo could expunge Hess's conviction from his record. Six months thereafter, Cooley asked Judge Stillo to expunge Hess's supervision, and the judge issued an order to that effect.

On October 2, 1991, Adam and Joseph Stillo were charged in a two-count indictment. Count I charged Judge Adam Stillo with conducting and participating in the conduct of the affairs of an enterprise (the Circuit Court of Cook County) through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) and 18 U.S.C. § 2. The first three predicate acts of racketeering activity charged Judge Stillo with accepting cash bribes from criminal defense attorneys for favorable rulings in violation of Illinois bribery laws (Ill.Rev.Stat. Ch. 38, ¶¶ 33-1(d) and (e)) and official misconduct (Ill.Rev.Stat. Ch. 38, ¶ 33-3). The fourth racketeering predicate act involved the *Hess* case and included four subpredicate acts the proof of any of which would suffice to establish the fourth predicate act. The four subpredicate acts were: (1) conspiring with his nephew, Joseph Stillo, to commit state bribery; (2) conspiring with Joseph Stillo to commit official misconduct; (3) state law bribery; and (4) conspiring with Joseph Stillo to commit extortion in violation of 18 U.S.C. § 1951.

Count II, also related to the *Hess* episode, charged both Stillos with conspiring from August 8, 1986 to April 1987 to commit extortion in violation of 18 U.S.C. § 1951.

On July 29, 1993, a jury found Judge Stillo guilty on both counts and Joseph Stillo guilty on Count II.[1] Judge Stillo was sentenced to four years' imprisonment and his nephew to two years' imprisonment and a $10,000 fine. According to our information both Stillos are serving their sentences.

Discussion

I. Joinder

Joseph Stillo argues that the charge against him was improperly joined in the same indictment with those against his uncle, Judge Stillo. Alternatively, he argues that even if joinder was proper, the district court abused its discretion in denying his pretrial motion for severance.

Federal Rule of Criminal Procedure 8(b) permits defendants to be charged in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." We have construed this rule broadly to allow liberal joinder in order to enhance judicial efficiency. *United States v. Curry*, 977 F.2d 1042, 1049 (7th Cir.1992), *certiorari denied*, ___ U.S. ___, 113 S.Ct. 1357, 122 L.Ed.2d 737. As we stated there, the rule recognizes that joint trials are beneficial not only for efficiency but because they limit inconvenience to witnesses, avoid delays in bringing defendants to trial, and allow the

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[1] The jury found that Judge Stillo had committed the first and fourth predicate acts of racketeering – including all the subpredicate acts except state law bribery.

"total story" to be presented to a single jury. We review a claim of misjoinder *de novo, United States v. Coleman*, 22 F.3d 126, 134 (7th Cir.1994), but will only reverse a conviction if the misjoinder "results in actual prejudice because it 'had substantial or injurious effect or influence in determining the jury's verdict.' " *United States v. Schweihs*, 971 F.2d 1302 (7th Cir.1992), quoting *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814.

Count II charged the two Stillos with conspiracy to extort money from attorney Cooley. Both Stillos were alleged to have "agreed to work together to obtain money from Cooley" and to have met with Cooley on separate occasions to reach this end. It is well settled that a conspiracy charge is a proper basis for joinder under Rule 8(b) and it is clear that in this particular conspiracy both defendants "participated in the same series of acts or transactions." Joinder of defendants in this count was thus clearly proper.

The only real issue is whether Count I, the RICO count in which only Judge Stillo was named, was properly joined with the extortion count which involved Joseph Stillo as well. The government cannot bootstrap multiple defendants with similar but unconnected offenses into a single indictment by combining Rules 8(a) and 8(b) and the existence of overlapping defendants. *Schweihs*, 971 F.2d at 1322. If the RICO count were unrelated to the extortion count, *i.e.*, not part of the "same series of acts or transactions," joinder would indeed have been improper. But that is not the case. The *Hess* bribery scheme charged in Count II was also the fourth predicate act of racketeering in Count I. Because the overlapping

Hess scheme was the sole predicate act to have occurred within five years of the indictment, it was a necessary element of the RICO claim against Judge Stillo. Therefore, severance of the two counts would have required trying the *Hess* episode twice. Moreover, the other predicate RICO acts in which Joseph Stillo was not involved were earlier attempts by Judge Stillo to collect bribes from criminal defense lawyers and thus part of the same "series of acts or transactions" as the later *Hess* scheme. Joinder of both counts and defendants was thus proper under Rule 8(b).

Joseph Stillo contends that even if joinder was proper the district court abused its discretion in failing to grant a severance. Federal Rule of Criminal Procedure 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of . . . defendants . . . for trial together, the court may order an election of separate trials or counts, grant severance of defendants or provide whatever other relief justice requires.

To establish an abuse of discretion by the trial court, Joseph Stillo must show that without a severance he was unable to obtain a fair trial, not merely that a separate trial would have offered him a better chance for acquittal. *United States v. Boykins*, 9 F.3d 1278 (7th Cir.1993).

Joseph Stillo complains of "prejudicial spillover" from the evidence of pervasive corruption relating to the predicate RICO offenses in which he was not involved. In order to succeed on this claim, Joseph Stillo "must rebut the dual presumptions that a jury will (1) capably sort through the evidence and (2) follow limiting instructions

from the court to consider each defendant separately." *United States v. Lopez*, 6 F.3d 1281, 1286 (7th Cir.1993). He has not cleared either hurdle.

Because Joseph Stillo was only involved in the *Hess* episode, it was easy for the jury to compartmentalize the evidence involving Joseph Stillo and that transaction from Judge Stillo's earlier bribe taking. Moreover, the district judge gave frequent, clear, and explicit instructions to this effect.

Finally, the jury amply demonstrated its ability to sift through the evidence with particularity when it found that the government had not proven that Judge Stillo committed the two racketeering predicate acts involving bribery schemes with defense attorneys other than Cooley. Joseph Stillo's argument that he was severely prejudiced by the spillover from evidence which the jury found insufficient against Judge Stillo, at whom it was directed, is unconvincing.

II. Sufficiency of the Evidence

Both Stillos challenge the sufficiency of the evidence supporting two elements of Count II, the extortion charge.

A. Interstate Commerce

The Hobbs Act prohibits extortion which "in any way or degree . . . affects [interstate] commerce." 18 U.S.C. § 1951(a). Because the Supreme Court has interpreted this statute to reach the limits of the Commerce Clause, *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4

L.Ed.2d 252, the burden on the government to establish this element is slight or *de minimis*. *United States v. Shields*, 999 F.2d 1090 (7th Cir.1993), *certiorari denied*, ___ U.S. ___, 114 S.Ct. 877, 127 L.Ed.2d 74.[2] In this case as in *Shields*, the government relied on a "depletion of assets theory." If Judge Stillo had accepted a bribe from Cooley, the assets of Cooley's law firm, which it was established purchased items in interstate commerce, would have been depleted. Payment of the bribe thus would have the potential to affect the firm's ability to purchase goods in interstate commerce – a nexus which this court has held sufficient

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[2] Following oral argument, Joseph Stillo submitted the Supreme Court's recent decision in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626, in support of his argument on the insufficiency of the government's evidence linking defendants' actions to interstate commerce. In invalidating the federal ban on guns in school zones, *Lopez* made clear that not everything is possible under the Commerce Clause. In so holding the Court did not call into question the Hobbs Act which – unlike the school gun ban – is aimed at a type of economic activity, extortion, and contains an express jurisdictional element. Nor did the *Lopez* decision undermine this Court's precedents that minimal potential effect on commerce is all that need be proven to support a conviction. "Where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Lopez*, at ___, 115 S.Ct. at 1629, quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n. 27, 88 S.Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020.

More relevant than *Lopez*, though not brought to our attention by defendants, was the Court's decision five days later in *United States v. Robertson*, ___ U.S. ___, 115 S.Ct. 1732, 131 L.Ed.2d 714. In *Robertson*, the Court in a *per curiam* opinion reinstated the defendant's RICO conviction, holding that defendant's Alaskan silver mine was engaged in interstate commerce because it purchased supplies from out of state.

on numerous occasions. See *United States v. Murphy*, 768 F.2d 1518, 1531 (7th Cir.1985), *certiorari denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304.

Defendants argue that the connection between potential bribe payments and the law firm's participation in interstate commerce fails at three points. None of their contentions, however, casts doubt on the jury's verdict. First, defendants question the connection between Cooley's assets and the purchase of goods by his law firm in interstate commerce. But the government presented numerous items purchased by the law firm in interstate commerce, including a calculator and will covers, and an office employee of Cooley's firm testified that such supplies were purchased from a common account to which the three members of the firm, including Cooley, made weekly contributions. Though the government did not trace the purchase of a particular out-of-state calculator to Cooley's contribution to the account, the general set-up was sufficient to support the jury's finding that the payment of a bribe by Cooley could potentially deplete the assets with which the firm purchased goods and services in interstate commerce.

Defendants next contend that based on Cooley's statement to Joseph Stillo at lunch that his client would be paying the bribe, Cooley's assets were not implicated. This argument fails for two reasons. First, the extortion conspiracy was already in place at the time of the luncheon conversation. It is the potential effect on interstate commerce at the time of the offense which is relevant. Later developments which negate or lower the potential effect on interstate commerce do not undermine the jurisdictional element. *United States v. Staszcuk*, 517 F.2d 53, 60

(7th Cir.1975) (en banc), *certiorari denied*, 423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56. Second, even if the Stillos believed from the start that the fictional *Hess* would ultimately be footing the bill, the temporary depletion of Cooley's assets until repayment and the risk of non-payment would be sufficient to satisfy the *de minimis* interstate commerce requirement. See *United States v. Lewis*, 797 F.2d 358, 365 (7th Cir.1986), *certiorari denied*, 479 U.S. 1093, 107 S.Ct. 1308, 94 L.Ed.2d 162.

Defendants' final argument is that because the *Hess* case was a sham, the FBI and not Cooley or his law firm would ultimately have paid any bribe. This court rejected an identical argument in *Shields*, 999 F.2d at 1098, in which Cooley again working with the FBI attempted to bribe another Cook County Circuit Court judge. The ultimate source of potential bribe money was found irrelevant because "the Hobbs Act proscribes not just successful extortion schemes but attempts to induce a victim engaged in interstate commerce to part with property" and the intended victim was Cooley, not the FBI. *Id.* (citation omitted).

B. Money

Joseph Stillo next argues that the government failed to prove that Joseph and Adam Stillo agreed between themselves to extort *money*. This argument fails on two levels. First, as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required. See *United States v. Lewis*, 797 F.2d 358 (7th Cir.1986), *certiorari denied*, 479 U.S.

1093, 107 S.Ct. 1308, 94 L.Ed.2d 162. Second, as a factual matter the evidence was more than sufficient for the jury to find that the Stillos conspired to extort money in this case. Cooley testified that on every occasion in which he bribed Judge Stillo there was a cash payment. Moreover, in a taped conversation between Cooley and Joseph Stillo discussing the *Hess* case, Cooley stated: "You tell me what's fair and we'll take care of it then," and Joseph Stillo responded "Alright." Cooley testified that his statement meant, "You tell me how much money the two of you want and I'll pay." The jury could have accepted Cooley's more than plausible account of the conversation and infer from Joseph Stillo's affirmative reply that he and his uncle were in agreement.

III. Jury Instructions

Defendants contend that the district court wrongly instructed the jury regarding the interstate commerce element of the Hobbs Act and the *mens rea* required to commit the Illinois offenses of conspiracy to commit official misconduct, conspiracy to commit bribery and bribery. The district court's selection of a particular jury instruction is reviewed in the light most favorable to the government, and "[a]s long as the jury instructions, viewed as a whole, address the issues fairly and adequately, we will not interfere with the district court's selection." *United States v. Schweihs*, 971 F.2d 1302, 1324 (7th Cir.1992).

A. Interstate Commerce

Joseph Stillo offered and the district court rejected the following instruction on interstate commerce:

> The interstate commerce element of affecting commerce by extortion is satisfied if the government proves beyond a reasonable doubt that Robert Cooley made monetary contributions to his law office around the time of the alleged conspiracy, and his law office used such contributions to purchase goods that originated from outside the state of Illinois.

The court rejected the proposed instruction because it would have required that the government trace Cooley's contributions to the common fund to actual purchases in interstate commerce. As the discussion in Part II A demonstrates, this is more than is required under our case law. The district court instructed the jury that:

> The interstate commerce element of the offense of affecting commerce by extortion is satisfied if the government proves beyond a reasonable doubt that the law office of Robert J. Cooley customarily purchased goods that originated from outside the state of Illinois such as materials necessary for the function of his law office.
>
> The law does not require an actual effect. In this case, you must simply determine whether the alleged extortionate transaction, if completed, had the potential to affect commerce, however minimally.

Joseph Stillo claims two errors in these instructions: (1) that they do not require the jury to find that Cooley contributed to the funds used by the law firm to purchase

out-of-state supplies, and (2) they do not require that the purchases in interstate commerce occurred at the time of the alleged extortion.

As to the first issue, it is true that the given instruction does not explicitly require that the jury find that Cooley contributed money to the firm's expense fund. The government's evidence on this point was, however, uncontradicted. Moreover, for the jury to find a potential effect on commerce according to the second prong of the instructions, it would have to find that the assets of Cooley's firm and not just his personal assets would be potentially depleted if a bribe were paid in the *Hess* case. Finally, since Cooley was acting in his professional capacity in his dealings with the Stillos, it was not necessary for the government to establish that Cooley contributed to the law firm's expense fund, since his law firm would probably (and that is all that is required) be liable for his business expenses (even illegitimate ones). See *United States v. Hocking*, 860 F.2d 769, 776-777 (7th Cir.1988) (approving instructions that required that the jury need only find that payor of bribe represented a business which purchased goods from out of state and that the bribe was paid on behalf of the business).

Joseph Stillo's complaint that the jury instruction did not require the jury to find a nexus with interstate commerce at the time of the extortionate act is also meritless. The given instruction adequately conveyed the requirement that the extortionate act have the potential to affect interstate commerce either immediately or in the future. That the potential exist at the time of the act and is not the result of some unforeseen change in circumstances is implicit in the instruction. Moreover, the potential effect

on interstate commerce in this case was foreseeable at the time of the extortion.

B. State Law Offenses

Judge Stillo attacks the instructions on the state law offenses predicate to his RICO offense, *viz.*, bribery and official misconduct, conspiracy to commit bribery and conspiracy to commit official misconduct. Because he did not object to these instructions at trial, we review only for plain error, *i.e.*, "if the error regarding the instruction would have probably changed the outcome of the trial." *United States v. Schulte*, 7 F.3d 698, 700 (7th Cir.1993).

Judge Stillo claims that the court failed to instruct the jury on the required *mens rea* that the bribe taker knew that the bribe was intended to influence the performance of his official duty. Judge Stillo is mistaken. The given instruction stated that "the government must prove . . . that the defendant knew that the money was tendered or promised with intent to cause any act related to the defendant's employment or function as a public officer."

Judge Stillo's challenge to the court's instructions on conspiracy are equally groundless. Judge Stillo contends that the court's instruction left out the "mental state required to prove a conspiracy." The court instructed the jury that to convict on conspiracy to commit official misconduct, it must find that Judge Stillo "agreed with another to commit an offense, namely, that when in his official capacity, the defendant knowingly would accept for the performance of any act, a fee or reward which he knows was not authorized." In instructing on the Hobbs Act conspiracy the court underscored the necessary

intent, stating that the government must demonstrate that "a conspiracy . . . existed [and] the defendant knowingly and intentionally became a member of the conspiracy." These instructions more than adequately informed the jury that it must find an intent both to agree and to commit the underlying offense.

IV. Conspiracy to Commit Bribery

Finally, Judge Stillo contends that the first subpredicate act of the fourth predicate act of his racketeering count, conspiracy to commit bribery, is not a legally cognizable offense. This claim fails on multiple levels. First, even if he is correct, it would not affect his RICO conviction since the jury found that he had committed two of the three other subpredicate acts – any one would do. Second, even if he is correct (which the government contests and we need not decide) that in some cases bribery as an agreement between briber and bribee and conspiracy to commit bribery are coextensive where the briber and bribee are the alleged conspirators, that is not this case. The alleged conspiracy was between Joseph and Judge Stillo. Joseph's conspiratorial agreement with Judge Stillo is not the agreement between briber and bribee which is the *sine qua non* of the substantive crime of bribery. See, *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir.1993).

JUDGMENT AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

CORRECTED: July 7, 1995
July 5, 1995

Before

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 94-2678 and 94-2679	No. 91 CR 795
v.	
ADAM STILLO, SR. and JOSEPH T. STILLO, Defendants-Appellants.	Harry D. Leinenweber, Judge.

ORDER

On consideration of the petition for rehearing filed by defendant-appellant Joseph T. Stillo in the above caption case, and adopted by Adam Stillo, Sr., and all of the judges on the original panel having voted to deny,

The petition for rehearing is DENIED.